

HINTS to JURIES

IN

TRIALS for LIBEL.

By a FREEHOLDER.

“ In times of difficulty and danger, more is to
“ be apprehended from the *violence* and *partiality*
“ of judges appointed by the crown, in *suits be-*
“ *tween the King and the subject*, than in disputes
“ between one individual and another, to settle the
“ metes and boundaries of private property.”

JUDGE BLACKSTONE.

LONDON:

PRINTED FOR AND SOLD BY J. JOHNSON, ST.
PAUL'S CHURCH-YARD.—1793.

[PRICE THREEPENCE.]

S
UK
991.2
HIN

^{1x}
H666

Recd. June, 21, 1899.

TO

THE FRIENDS OF THE LIBERTY OF THE PRESS,

FORMED INTO A SOCIETY,

AT A MOMENT OF AFFECTED DANGER TO THE
CONSTITUTION,

BUT REAL DANGER TO PUBLIC FREEDOM;

WHOSE EFFORTS HAVE CONTRIBUTED, AND WILL
AGAIN CONTRIBUTE,

TO CHECK THE RAVAGES OF PERSECUTION,

AND PRESERVE THE PEACE AND LIBERTY OF BRITAIN;

THIS SMALL PIECE,

WRITTEN AND PUBLISHED WITH THE SAME VIEW,

IS RESPECTFULLY INSCRIBED

BY

THE AUTHOR.

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE EDUCATION DEPARTMENT

HINTS TO JURIES

IN

TRIALS FOR LIBEL.

SECTION I.

THE NECESSITY OF POLITICAL DISCUSSION.

GOVERNMENT is either of divine or human institution; if it be of divine institution, it must be so under a certain form, what form of government, then, is prescribed by God Almighty? Is monarchy of divine institution? If it be so, it must be proved by one or more of the three following circumstances:—1st, It must be laid down as the only proper form of government in the Jewish and Christian scriptures; for these are the only books, which we ascribe to the Divinity. But this it is not; for that government which is said to have been instituted by God, over the Jews, was not monarchy, and when that people demanded a king, after the manner of idolatrous nations, they incurred the displeasure of Heaven, and God is said to have given them a king in his wrath. No form of government whatever is prescribed in the Christian scriptures, but Christians are charged in general to yield obedience to civil governors. Nay St. Peter, when he charges the
Christians

Christians to be obedient to the King, as the supreme governor, expressly calls the institution an "*ordinance of man.*" See 1 Peter ii. 13.

Monarchy is then neither forbidden nor prescribed in the scriptures; if it be of divine institution, therefore, it must,

2dly, Be established in every country where it exists by miracle—this however is not pretended to be the case.—Is it then, in the third place, an institution, the excellence and perfection of which are intuitive truths, and strike alike all mankind; for if this be the case, the institution must flow from the constitution of man, and therefore be an original dictate of Heaven. But this cannot be the case, else it would never have been the subject of debate. It must necessarily have existed in all countries and at all times, for what is the result of the formation of man must exist wherever man exists. Monarchy, so far from possessing this character, exists not at this moment in many countries, nor has there ever been a period in which it has been honoured by universal adoption; nay one government, instituted by God, over the Jews, was not of this form—so that it is evidently not written by God on the heart of man, as a consistent being can never prescribe different and opposite institutions to the same people, at the same time.

Government then "is a contrivance of *human* "wisdom, for the supply of human wants;" and whatever form of government best supplies those wants, that form, whether it be monarchy, limited or absolute, aristocracy, or pure democracy, ought to be adopted.

It is a matter open to the examination of every mind, which of these forms of government is best adapted to secure the end of government, the happiness

happiness of the society ; and the history of every age affords a variety of new facts, or data, from which mankind are enabled to draw conclusions more accurate, than those of former times, and thus to strike out new light in this important science. This however can only be done by allowing the utmost freedom of discussion of this as well as every other subject ; for the science of government must be made perfect, in the way every other science is brought to perfection, and that is by free examination. By a series of happy innovations, we have in England arrived at our present state of improvement ; time was when we sacrificed human beings to please God, bowed down and worshipped a god made of paste, by a priest, and trembled before a tyrant, whose will was law, and whose frown was death ! Britons ! do you wish to return to the same state ? Then resign the right of reasoning, of reading and of writing on political subjects ; subscribe to the opinion of Judge Allybone, " that no man can take upon him to write against the actual exercise of government, *unless he have leave from the government,*" and the business is done.—Leave from the government ! What will governors give leave to any one to write against them ? If they do, then it is because they are pure, and, if so, leave is unnecessary for them ; for writing against them will only bring their excellence to light, and unnecessary for you ; for your freedom will be acceptable.

The most cursed and abominable tyranny, which ever had existence, never required more than that the subject should think it perfect, and speak and write nothing against it.—And if there be a government, if there be a constitution, which enjoins this on the subject which makes it a crime
to

to think and to publish any thing opposite and different from itself, it differs not from the most atrocious tyranny. In Turkey, in Russia, in Prussia it is not forbidden *to praise* government.— That government alone is just, which permits every one who pays to its support, to examine its conduct, and to offer his opinion on its measures.

A good government will not only permit, but, in all times of internal peace, *invite* every citizen freely to examine its operations. The proprietor of a beautiful painting does not content himself with praising the execution of his piece, but, placing others by its side, *solicits* every one to look and examine it, that its perfection may be seen more strongly, by comparison with the defects of others.

It is extremely injurious to any thing that is good, that it is forbidden to be examined, suspicion expects nothing but defect and deformity, where exposure is avoided.

Let it not be objected that the best institution may be abused by misrepresentation and falsehood; a state of peace is desirable to all, men never “venture out to sea in a storm for nothing,” and as the people are more inclined to give credit to those in authority, than to an unaided individual, the treasure of a government, not intolerably bad, will always procure writers sufficient to expose the falsehood and sophistry of obscure men, and if falsehood be to be dreaded, when levelled against government, *is it never to be feared, when made an engine of state?*

It is happy for Englishmen, that it is the law of their land, according to the declaration of the present Attorney General, who has had much experience, by which to gain knowledge on this head,—“ That any one may argue and write
“ against

“ against the English constitution, as well as in
 “ favour of it, in the way of sober disputation, for
 “ the sake of discovering the truth, provided his
 “ intention be not to inflame the people, and pro-
 “ duce an insurrection.”

This is all a good man wishes or expects; his desire is not to destroy one government, that chance or violence may substitute another, perhaps worse, in its room; he only endeavours to instruct all the citizens in their rights and duties, that if reforms be necessary, they may solicit them without commotion, and accept them with gratitude.

SECT. II.

ON THE IMPORTANCE OF TRIAL BY JURY.

IN civil causes, the English have always considered the trial by jury of the greatest importance; but if the trial by jury be a valuable privilege in civil causes, where the judge cannot be biassed in favour of either party, how much more important is it in trials for libel, where the executive branch of the government being the accuser, and the judge being a member of this branch, the judge himself may be considered as a party in the cause. It will perhaps be said, that this is the case in all criminal prosecutions, as they are all carried on in the name of the King. Although other criminal prosecutions are carried on in the name of the King, yet as the injury is sustained by an individual, (as in assault, robbery, murder, &c.) neither the King, nor any who represent him, can be prejudiced against the party,
 nay

any farther than the circumstances of the case impress any indifferent persons, wholly unconnected with the person injured. And this is so evidently true, that the judge is often, and very properly called in England, Counsel for the prisoner. But was it ever known that the judge much exerted himself, as counsel, for the prisoner, who was charged with publishing a libel? A libel is supposed to attack the executive government itself, and a person composing part of that government, whose conduct may be supposed to be implicated in the charge, must be more than human to be free from prejudice against the prisoner. If it be ever important that a man should be tried by his Peers, it is so in cases of LIBEL. Here the jury should be free, candid, and independent.—Nor should any one suppose, that as juries will, when properly informed, feel much interest in questions which involve so nearly their rights and properties, they may be too much inclined to acquit one who may be tried for bringing a false charge against government, for the fact is, juries are too much inclined to lean to the side of the court, and they will always be inclined to support any government, which is good, as the subjects have as much interest in the support of a good government, as the rulers themselves.—If there ever arise any danger to government from the trial by jury, it must be to a government intolerably bad, under the oppression of which all individuals groan. English juries, in trials for libel, have never appeared much to favour the person accused, even the popular Mr. Wilkes himself was found guilty by a jury!

When a government becomes intolerable, and no longer worthy of support, still the trial by jury must be supported; and still it must be of the
most

most essential importance, as those who pay are better judges, what system is worthy of support, than those who receive the treasure of the nation,—as he who employs a steward should be the best judge, whether he is worthy of his employment and support.

It is too frequently the case, that government chuses that trials for libel should be by special juries, which seems improper; because most public questions involve the interests, privileges, or immunities of the rich, in opposition to the rights of the poor, and it seems not improbable that the rich may come prejudiced, on that account, to try the question at issue.

Will any one say, if a person under the old government of France, had been indicted for writing and publishing a book on the impropriety of the nobles continuing to be exempted from taxes, that those very nobles would have been proper jurors to try the supposed offender? The power which the Attorney General possesses of filing informations *ex officio*, and so putting a man to the expence of a trial, without the judgment of a grand jury, seems, likewise, hostile to the best maxims of a free government—and some of the judges themselves seem to have been sensible of this, for Sir Matthew Hale is reported to have said, “that “if ever this matter came into dispute, it could “not stand, but must fall to the ground.” In other criminal cases, where government is not properly a party, a grand jury is necessary, here, where government is a party, a privilege is granted of arraigning the citizens, for, perhaps, no real offence, and putting them to much expence, and exposing them to great odium and anxiety!

SECT.

SECT. III.

THE RIGHTS OF JURIES.

BOTH before and since the glorious Revolution of 1688, it hath been held to be law, by crown lawyers and judges, that in trials for libel, the jury was a judge of the fact, but not of the law. That is, the jury was to judge, simply, whether the person accused published such a writing, or uttered such expressions, but it belonged to the judge alone to pronounce upon the criminality thereof; so that if a man had been indicted, for, falsely, maliciously, and scandalously, with an intent to raise sedition, saying, "the taxes were heavy, and had become a great burthen upon the public."—If it were proved to the jury that he used such expressions, it was to find the man guilty, and so subject him to a fine and imprisonment, because it had pleased some enemy to get him indicted, and, forsooth, the judge alone could ascertain the intention with which these words were spoken! Or to state the case in the words of the late Sir John Hawles, Solicitor General,—
 "Suppose a man should be indicted, for that he,
 "as a false traitor, not having the fear of God
 "before his eyes, did, traitorously, presumptu-
 "ously, against his allegiance, and with an intent
 "to affront his Majesty's person and government,
 "pass by such or such a royal statue, with his
 "hat on his head, to the great contempt of his
 "Majesty's authority, the evil example of others,
 "against the peace, and his Majesty's crown and
 "dignity." If the fact could be proved that he
 did

did pass by such a statue with his hat on, then the jury should find him *guilty*, and subject him to *fine* and *imprisonment*. As if it were indeed criminal for a man to pass a statue with his hat on his head! But, the jury was only to judge of the *fact*, and the judge was to determine whether it were a crime! Yet nothing but *crime* involves *guilt*; if the jury then did not consider the criminality of the action, but merely the action, whether or not it were performed, how could it pronounce *guilty*? At this rate a man might have been found *guilty of eating his dinner*!

However, an act was passed last year in parliament (though opposed by the judges) to remove doubts, respecting the functions of juries in cases of libel, introduced by a man to whom England owes much, and from whom she expects more, the illustrious patriot, CHARLES JAMES FOX. By this bill power is declared to be in juries, to judge, not only of the matter of fact, whether such an article was written, or such an expression used, by such a man, but also to examine the expression and article, and pronounce upon the matter, not only whether the person accused did or did not so write, or so speak, but whether the matter written or spoken be or be not *criminal*, and done with *criminal intent*.—Thus speaks the act of parliament —“ Be it therefore declared and enacted by the
 “ King’s most excellent Majesty, by and with the
 “ consent of the Lords Spiritual and Temporal, and
 “ Commons in this present parliament assembled,
 “ and by the authority of the same, that on every
 “ such trial the jury sworn to try the issue, may
 “ give a general verdict of *guilty or not guilty* upon
 “ the whole matter put in issue upon such indictment
 “ or information, and shall not be required or directed
 “ by the court or judge, before whom such indictment
 “ or

“ or information shall be tried, to find the defendant
 “ or defendants guilty, merely on the proof of such publication by defendant or defendants, of the paper
 “ charged to be a libel, and of the sense ascribed to
 “ the same in such indictment or information.” This clearly ascertains the right of juries, to examine the matter of charge, and to pronounce guilty or acquit the defendant according to their idea of the innocence or criminality of the matter charged to be a libel, and the intention of the person accused as a libeller.

SECT. IV.

THE DUTY OF JURIES.

THE first duty which a jury ought to discharge in trials for libel, is to examine the indictment or information attentively, and to weigh the charges contained therein; nor is it of inferior importance, to see the book or writing which is said to contain the matter of libel, in order to examine the context and connection in which the words occur. The sense of a paragraph often entirely depends upon that which goes before, and that which follows after it, nor is it uncommon to find detached sentences expressive of the most wicked falsehood, which, taken in their connection, are the most wholesome truth. There is a sentence in the New Testament, which says “ *there is no God;*” but, by referring to the context, you see this horrid blasphemy converted into a sacred truth.

As it is well known that a mistake in the least word, affecting the sense of an indictment, will
 quash

quash it, it is the duty of juries to observe every word, especially such as set forth, or describe the intention, with which the writing, charged to be a libel, was published.

In indictments or informations for libel, the matter is said to be *false* and *scandalous*, which words describe the nature of the writing; and *malicious*, which describes the *intention* with which it was published.

After then it has been clearly proved to a jury, that the writing was published by the defendant, the jury is to enquire if it answers the description given it in the indictment; and after reading the book itself, enquire, first, is it *false*? For if it be *true*, the defendant is not guilty of what is laid to his charge, that being described as *false*, he, therefore, should be *acquitted*. Besides, if the matter be *true*, however obnoxious it be to any body of men, it ought to be known and spread abroad; because though falsehood may serve a small party, by deceiving the multitude, it can never be the interest of a *Nation* to be deceived. *Truth is not a libel*—for every indictment describes the matter of *libel as false*.

But when the matter is found, by clear pointed evidence, to be *false*, a question occurs to the jury, sworn to try the whole matter, whether this *falsehood* was fabricated by the publisher, or whether he was first of all deceived, and so innocently repeated what he had heard; for surely there is no crime in being unintentionally deceived. The information or indictment charges the matter with being *malicious*, thereby meaning to describe the *intention* of the supposed libeller.

The laws of England are always very exact in ascertaining the *intention* with which any thing is done, rightly judging, that *intention constitutes crime*.

crime. Thus if a man strike another by accident, or in a violent passion, without *premeditated malice*, or an intention to kill, the law calls this not *murder*, but *homicide*; and the punishment of death is never inflicted in such a case. So if a person publishes what is called a libel, if the *criminal intention*, to stir sedition, is not made clear, he should be entirely acquitted of the whole charge, which altogether depends upon the *malicious intention*. For he is not indicted for publishing a *false* and scandalous writing merely, but a false and scandalous writing *maliciously*, and with an intent to stir sedition, which must either *all* be proved, or the indictment is false, and a jury who should find a verdict of *guilty* on the whole matter, would be perjured.

As every question which is debated, admits of much being said, in a way of reason and argument, on both sides, so if a jury does not agree with the arguments of a person, who speaks or writes on government; yet the matter admits of two opinions, and, as error is no crime, so to have advanced and argued in defence of what may be deemed erroneous, indicates no criminal or malicious intention, and involves no crime, else every one ought to be punished for every error he advances. A false theory of government, therefore, subjects not its author to any punishment, unless it be published with a *criminal intention*; which it behoves the jury never to forget, as it is sworn to try the *whole matter*, and to bring in a verdict according to evidence thereon.

When the matter charged with being a libel, consists of *words spoken*, the question of intention is still more difficult to ascertain. Words may be spoken *ironically*, and thus express an opinion which they mean to censure or ridicule. They may be spoken
in

in *great heat*, and be called forth by the *warmth of debate*, and so flow from no *bad intention*, nor even express a settled opinion in him, who uses them. How apt are some men to damn the man they most love and reverence; their hasty words, and their fixed affections and opinions, are in direct opposition. If killing a man in sudden passion be no murder, surely expressing, unguardedly, and in the height of warm debate, an improper word or sentiment is no sedition. The indictment charges the intention, let the jury remember the oath. Words spoken are liable to misrepresentation above all things, from the circumstance of their context and connection, (on which the sense of every thing depends) being forgotten.

The laws of England are properly jealous of human memory, and have appointed (so liable are men to forget fugitive words, and the connection in which they are spoken) that if a man leaves his personal estate by an unwritten or nuncupative will, that his directions concerning it should be committed to writing in the course of six days, or the disposal cannot be proved and carried into execution six months after it is made. If this just regulation be necessary, in a matter which relates to sums of money, the meaning of which cannot be affected by the connection in which they are named; how much more necessary is it, that juries should receive, with extreme suspicion, evidence of words, the meaning of which depends entirely on the connection in which they were spoken, some months after they are said to have been used! If juries be not particularly guarded on these causes, what man can be safe! A system of revenge, accusation, and punishment, may spread through the land, where there has no crime
been

been committed.—What a door opened for the gratification of private pique, and personal resentment, and opened by government, which ought to be equally the protector of all !

A profound and elegant writer has expressed sentiments so just on this head, that I cannot forbear quoting his own words—

“ Before the intention of any man can be ascertained in a court of justice, from the consideration of the words he has employed, a variety of circumstances must be taken into the account. The witness heard the words which were employed ; does he repeat them accurately or has not his want of memory caused him to substitute, in the room of some of them, words of his own ?

“ Before it is possible to decide upon the confident expectation I may entertain, that the words will be followed with correspondent actions, it is necessary I should know *the exact tone* with which they were delivered, and *gesture* with which they were accompanied. It is necessary I should be acquainted with the context and occasion that produced them.

“ Their construction will depend upon the quantity of momentary heat, or rooted malice, with which they were delivered, and words, which appear, at first sight, of tremendous import, will sometimes be found, upon accurate investigation, to have had a meaning purely ironical in the mind of the speaker. These considerations, together with the odious nature of coercion in general, and the extreme mischief that may attend our restraining the faculty of speech, in addition to the restraint we conceive ourselves obliged to put on men's actions, will probably be found to afford a sufficient reason,
“ why

“ why words ought seldom or never to be made a topic of political animadversion.”†

SECT. V.

THE CHARACTER OF INFORMERS.

AN informer is one, who betrays that confidence which gives to social intercourse its finest relish, which enables man to indulge the innocent sallies of his mind, and open his heart without suspicion and without reserve. Accordingly, in every age and country, an informer has been considered as the opprobrium of human nature, the assassin of domestic peace, and the TRAITOR of human society.

Labouring under such imputations and prejudices, it is certain that no one will turn informer, who is not high in the ranks of virtue, or deeply sunk in the obliquities of vice.

It is the most sublime effort of virtue, to act under the opposition of prejudice and odium; if, therefore, there be a cause, which, from its magnitude and importance, calls for immediate communication to government, it requires apostolical virtue in the man, who, in defiance of the infamy which attends the action, steps forth in the character of an informer. Who does not execrate the man who betrayed Lord Russell? Every man of virtue would rather perish, than be classed with such a villain.

Great and pressing indeed must be that necessity, which will render an informer respectable. The

† Goodwin's Enquiry into Political Justice.

man who may turn informer without suspicion of venality, must not be a placeman or pensioner,—nor a dependant on placemen and pensioners ; he must not be a lawyer or attorney, who lives by prosecutions, nor a dependant on lawyers and attorneys ; he must be pure and unspotted in his previous character, independent in mind and estate, and unconnected with those who have the keys of the treasury. How few informers are of this character ! The wretched hirelings of office, the miserable scouts of more miserable pettifoggers. Informers in general form a group of profligacy, wretchedness, and want, from which the observer starts back with horror and disdain.

Englishmen ! jurors ! whose life is safe, whose property is secure, if you receive not the evidence of such men with anxious caution ?

SECT. VI.

THE CERTAINTY OF THE PROGRESS OF TRUTH, AND
THE FUTILITY OF PROSECUTING OPINIONS.

FALSEHOOD needs but to be opposed by truth, prosecution is unnecessary. The progress of truth is certain, as the progress of knowledge, and nothing, which does not annihilate the latter, can arrest the former in its course. Truth is nothing but the agreement of our perceptions, with objects as they exist, or the seeing things as they are, and as fast as the knowledge of nature advances, so fast must error disappear, and truth assert its triumph. Truth is nothing but knowledge, error is nothing but ignorance.

Newton

Newton and Boyle have laid the foundation of the general detection of all those errors, which have been imposed upon mankind by the arts of LEGERDEMAIN. Reason has shaken off its tears, and is walking abroad majestically,—it contemplates nature with a steady eye, and craft and imposition sculk in their dens.

The philosophers of Europe and America have ushered in the day, which shall detect the impositions of priestcraft and dissolve the chains of ARISTOCRACY.

He who would suppress knowledge, must destroy all the printing presses, murder all the philosophers, and burn all the books in the world.

The prosecution of opinions, is their diffusion, the mind is called to the subject—the subject is examined, and every groan uttered by philosophy enters the soul, and directs the judgment of the citizens. Christianity was spread by the very means which were taken to suppress it.—The seeds of the reformation were scattered by the storms of persecution—they grew, they flourished, and yield the richest increase, when soaked in the blood of the reformers.

The cruelty of Alva, and the introduction of the Inquisition, gave light, religion, and liberty to the Low Countries.

Persecution peopled America, and oppression planted the tree of liberty in that sacred soil.

The awful experiment has been tried, the terrible apparatus has been stained with blood.—Philosophers rejoice, preach peace to the nations, the triumph of knowledge is sure.

FINIS.

Ex GMB